

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

**EVANGELINA A. PRADO and
NOELIA P. LELAURIN,**
Plaintiffs

v.

JOHN MCHUGH,
Secretary of the Army
Defendant.

§
§
§
§
§
§
§
§
§

CASE NO. 2:12-cv-00007

DEFENDANT’S RULE 12(b) MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant John McHugh, Secretary of the Department of the Army, respectfully moves the Court for an order dismissing this civil action for failure to properly serve process and file a return of service within 120 days of the filing of the complaint.

1. Time Limit for Service of Process

This civil action was filed on January 10, 2012. “If a defendant is not served within 120 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.” Fed. R. Civ. P. 4(m).

2. Burden of Proof

“When service of process is challenged, the serving party bears the burden of proving its validity or good cause for failure to effect timely service.” *Systems Signs Supplies v. U.S. Dept. of Justice*, 903 F.2d 1011, 1013 (5th Cir. 1990).

“To establish good cause, a litigant must demonstrate at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice. Additionally, the claimant must make a showing of good faith and establish some reasonable basis for noncompliance within the time specified.” *Systems Signs*, 903 F.2d at 1013 (internal citation and quotation marks omitted).

3. Summons Mailed to the Secretary of the Army

The summons mailed to the Secretary of the Army is a nullity because it is not signed by the Clerk and does not bear the Court’s seal as required by Fed. R. Civ. P. 4(a) & (b).

“The issuance of a summons signed by the Clerk, with the seal of the Court, and the time designated within which defendant is required to appear and attend, are essential elements of the court’s personal jurisdiction over the defendant.” *Ayres v. Jacobs & Crumplar, P.A.*, 99 F.3d 565, 568 (3rd Cir. 1996).

4. Summons Mailed to the Attorney General

The summons mailed to the U.S. Attorney General is a nullity because it is not signed by the Clerk and does not bear the Court’s seal as required by Fed. R. Civ. P. 4(a) & (b). *See Wells v. Ali*, 304 F. App’x 292, 295 (5th Cir.2008)(affirming dismissal because the summons issued to a particular defendant was not signed or sealed by the clerk of court).

5. United States Attorney

This action should be dismissed because it has been pending for more than 120 days and Plaintiff has not filed a proof of service as required by Fed. R. Civ. P. 4(l)(1). *McGinnis v. Shalala*, 2 F.3d 548, (5th Cir. 1993); *George v. United States Department of Labor*, 788 F.2d 1115, 1116 (5th Cir.1986); *Milton v. Shinseki*, 2011 WL 1831698, *2 (S.D. Tex.).

For the foregoing reasons, the Defendant respectfully requests that the Court dismiss Plaintiff's Complaint for failure to timely file proof of service of process..

Respectfully submitted,

KENNETH MAGIDSON
United States Attorney

By: /s/ *Charles Wendlandt*
CHARLES WENDLANDT
Assistant United States Attorney
Southern District of Texas No. 12172
Texas Bar No. 21171500
800 N. Shoreline, Suite 500
Corpus Christi, Texas 78401
Telephone: (361) 888-3111
Facsimile: (361) 888-3200
E-mail: Chuck.Wendlandt@usdoj.gov

Attorney-in-Charge for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

Thomas J. Crane
750 E. Mulberry, Suite 303
San Antonio, Texas 78212

/s/ *Charles Wendlandt*
CHARLES WENDLANDT